



THE LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF THE *Legal Profession Act*,
and in the matter of a Hearing regarding the conduct
of MURRAY ENGELKING, a Member of The Law Society
of Alberta

INTRODUCTION

1. On April 14, 15, and 16, 2009, a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society office in Edmonton to inquire into the conduct of Murray Engelking (the Lawyer). The Committee was Rodney Jerke, Q.C., Chair, Kevin S. Feth, and Wayne Jacques. The LSA was represented by Michael Penny. The Lawyer was present for the Hearing and was represented by Richard Wilson, Q.C.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1 through 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend, and the Certificate of Status of the Lawyer, established jurisdiction of the Committee.
3. There was no objection by the Lawyer's Counsel or Counsel for the LSA regarding the constitution of the Committee.
4. The Certificate of Exercise of Discretion was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing and neither Counsel for the LSA nor the Lawyer requested a private hearing; therefore the hearing was held in public.

CITATIONS

5. The Lawyer faced the following citations:

Citation 1: IT IS ALLEGED that you enabled misappropriations from your firm's trust account by engaging in any or all of the following:

- a) failing to provide meaningful and effective supervision of staff;
- b) operating the firm trust account in a negligent or reckless manner without regard for the safety of funds;
- c) failing to follow the Law Society accounting rules;
- d) failing to implement meaningful and effective office systems to safeguard client trust funds;
- e) delegating to staff tasks which were your responsibility; and
- f) failing to take steps to prevent further misappropriations when he knew or ought to have known that misappropriations were taking place;

and that such conduct is conduct deserving of sanction.

Citation 2: IT IS ALLEGED that you are guilty of gross neglect amounting to incompetence by the virtual abdication of all responsibility for the trust accounting aspects of your practice, and that such conduct is conduct deserving of sanction.

Citation 3: IT IS ALLEGED that you failed to serve clients in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.

Citation 4: IT IS ALLEGED that you failed to honour trust conditions, and that such conduct is conduct deserving of sanction.

Citation 5: IT IS ALLEGED that you failed to meet professional responsibilities in reporting and responding to the Law Society by engaging in any or all of the following:

- a) failing to report, or to report promptly to the Law Society, trust defalcations upon discovery;
- b) providing misleading information to the Law Society when initially self-reporting trust shortages; and
- c) failing to respond to the Law Society in a complete and appropriate manner;

and that such conduct is conduct deserving of sanction.

Citation 6: IT IS ALLEGED that you benefited from client trust shortages, and that such conduct is conduct deserving of sanction.

Citation 7: IT IS ALLEGED that you failed to respond to other lawyers and parties on a timely basis, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

6. On the basis of the evidence entered at the Hearing, and for the reasons set out below, the Hearing Committee dismissed Citations 1, 2, 3, 5, and 7. The Hearing Committee found that Citations 4 and 6 were proven and that for those Citations the Lawyer's conduct was deserving of sanction.
7. The Hearing Committee made the following orders concerning sanction:
 - a) An Order that the Lawyer be reprimanded;
 - b) An Order requiring the payment to LSA of a fine of \$5,000.00;
 - c) An Order requiring the payment to LSA by the Lawyer of three quarters of the actual costs of the Hearing.

EVIDENCE

8. A Binder with Agreed Exhibits 1 – 12(a) was entered by consent of the parties.
9. An Agreed Statement of Facts was entered as Exhibit 13 by consent of the parties.
10. Exhibits 14, 15, and 16 were entered by Counsel for the Lawyer.
11. Exhibits 17 and 18 were entered by Counsel for the LSA in relation to sanction.
12. The Hearing Committee heard evidence from the Lawyer.

SUMMARY OF FACTS

13. The facts, while complicated, are not in dispute. An extensive investigation conducted by the LSA resulted in an Investigation Report, a redacted version of which was made an Exhibit in the Hearing. The parties agreed that the factual parts of the Investigation Report are accurate. Broadly speaking, the Report shows that the Lawyer's legal assistant, Joan Fedio, engaged in numerous improper transactions in the Lawyer's trust accounts from November 2002 to February 2005, which cumulatively resulted in shortages in the Lawyer's trust accounts in excess of \$1,000,000.00. The transactions involved the misuse of client trust funds in the following ways:
 - a) Misappropriations to Ms. Fedio personally.
 - b) Payment of trust funds to clients prior to funds being received by the Lawyer for the clients' benefit.
 - c) Loans of trust funds to third parties (entities referred to here as Construction and 112).
 - d) Misappropriations to the personal benefit of a third party (referred to here as Q).
14. There is no allegation that the Lawyer was in any way involved in any of the misappropriations, all of which were accomplished by Ms. Fedio without the knowledge of the Lawyer or any one else at his firm.
15. Murray Engelking, the Lawyer, was admitted to the LSA on July 22, 1983. At the time relevant to the Citations, he practiced in a partnership with John Hautmann and two associates under the firm name of Campbell & Company. The Firm maintained more than one trust account on which the Lawyer and three other Firm Members had signing authority.
16. Joan Fedio was employed by the Lawyer as a legal assistant to assist him in his real estate practice. She had been employed by Campbell & Company for thirteen years and worked with the Lawyer for sixteen years in total, having followed him from another firm. The improper payments taken from the Lawyer's trust account came from funds held in trust for a number of clients, but primarily from the accounts of KH and its customers. (To protect client identities, pseudonyms adopted by the parties are utilized in this report for the Lawyer's clients, including KH, S, T, Motel, Girls, Flooring, and F.)

17. Initial misappropriations were covered up by a scheme called “lapping”. In lapping, amounts not immediately required to be paid out from one trust account ledger are used to meet the obligations under another trust account ledger, which would otherwise be in deficit, because of misappropriation from it.
18. Under the lapping scheme, so long as funds continue to be received into the mixed trust account, client obligations are met, and clients are unaware of the shortfall in their individual accounts, until either insufficient funds are received to conceal past misappropriations, or, as in this case, the improper accounting entries are discovered.
19. Ms. Fedio assisted the Lawyer and (from time to time) other lawyers in the Firm with their real estate practices, including preparing transactional documents, drafting trust cheques, calculating statements of adjustment and completing statements of trust funds received and disbursed. She was responsible for initiating and entering transactions directly into the trust accounting system.
20. The misappropriations required to operate the lapping scheme were executed by Ms. Fedio. She also took other steps to sustain the misappropriation scheme, including:
 - a) Falsifying accounting posting sources, such as cheque stubs, to avoid alerting a book-keeper of the existence of trust bank account overdrafts;
 - b) Depositing funds received from clients directly into trust without opening a client ledger for that client, but crediting the funds to accounts involved in the lapping and misappropriation;
 - c) Forging related documents, such as letters and courier slips, to make it appear that payments had been made, when they had not; and
 - d) Concealing correspondence and telephone calls from the Lawyer.
21. Ms. Fedio first misappropriated \$30,000.00 and \$66.58, by paying the funds to herself, on November 18, 2002. This was not discovered by the Lawyer until September, 2007.
22. On September 5, 2003, a cheque for \$80,675.00 placed the trust account of S into an overdraft, which was not rectified until sufficient funds were received on the client’s behalf on October 23, 2003. The Lawyer raised this matter to Ms. Fedio, who stated she had made a careless mistake. The Lawyer did not report this shortage to the LSA.

23. On June 4, 2004, a cheque for \$225,294.90 placed the trust account of Motel into an overdraft of \$196,707.00. On August 1, 2004, a cheque for \$173,634.11 placed the trust account of Girls into an overdraft of \$165,766.00. When the Lawyer became aware of these shortages, he corrected his trust records and on November 8, 2004 replenished the trust shortage from his own resources (\$196,766.64), and was later repaid. He was told by Ms. Fedio that the overdraft was the result of posting errors because mortgage funds had not yet been received. The Lawyer did not report these trust shortages and the payments he made to cover them to the LSA.
24. On August 3, 2004, Ms. Fedio misappropriated funds (\$34,300.00 and \$11,500.00) to the benefit of Q. The Lawyer did not become aware of this misappropriation until the investigation.
25. On August 30, 2004, a cheque for \$588,172.70 placed the trust account of Flooring into an overdraft of that amount which was not rectified until sufficient funds were received on the client's behalf on October 5, 2004. The Lawyer did not become aware of this overdraft until the investigation.
26. On December 23, 2004, a cheque for \$128,509.03 placed the trust account of T into an overdraft of that amount. On January 26, 2005, the Lawyer deposited \$128,509.03 from his own resources to cover the trust shortage, after being told the shortfall resulted from funds being paid before a mortgage was advanced. On February 9, 2005, a cheque was written to the Lawyer's benefit from T's trust account for \$128,509.03, however, this again put the trust account into a shortage position of \$128,509.03 until March 2005, when the Lawyer paid money into his trust account to cover that and other trust shortages. The Lawyer did not report this trust shortage, or the payments he made to cover these shortages in January 2005, to the LSA.
27. On January 7, 2005, Ms. Fedio misappropriated \$7,100.00 by a payment to her personal benefit.
28. From July 23, 2004 to February 24, 2005, Ms. Fedio misappropriated funds on twenty three occasions by payments to Construction and 112 for a total of \$833,779.40. The Lawyer became aware of these transactions, as he started an in-house examination on February 24, 2005.
29. In the result, Ms. Fedio's improper transactions involved twenty eight cheques, requisitioned on various files for which the Lawyer was responsible, and on which she was the legal assistant. The Lawyer signed only two of those cheques. Lawyers of the firm who had signing authority on the bank account on which the cheques were drawn signed the other twenty six cheques.

30. Meanwhile, on July 23, 2004, Ms. Fedio misappropriated \$112,451.00 from a trust account related to the sale of the F house. Because of the consequent shortfall, she was unable to pay the funds required to discharge Mr. F's mortgage. This resulted in Mr. F having to make mortgage payments he was not expecting. Ultimately a cheque was sent to the bank on August 10, 2004 by Ms. Fedio. F complained to the LSA, but the Lawyer did not become aware of this complaint until December, 2004.
31. The Lawyer's initial response to the LSA included an assertion that the money had been sent to the mortgagee's bank on July 23, 2004, but the bank must have lost it. Ultimately it became clear that no cheque had been sent on July 23, 2004. The Lawyer agreed to reimburse F for any interest cost or expense incurred. The Lawyer did not investigate the trust transaction in December, 2004.
32. C Developments delivered transfers to the Lawyer for four lots purchased by KH. It imposed trust conditions on the use of the transfers, including:
 - (a) "Forthwith upon your confirmation of registration of the Transfer of Land and the New Mortgage, you will request and use your best efforts to obtain the advance of the mortgage proceeds;" and
 - (b) "Immediately upon your receipt of such advance, you will forward to our legal counsel...for unconditional release, the Cash to Close, together with any interest thereon..."
33. The transfers were registered on August 26, August 27, and (two of them) on October 14, 2004. The purchase price for the four lots was not paid until December 23, 2004.
34. On January 6, 2005, Mr. Heinrich Pabst, C Development's lawyer, wrote to the Lawyer asking for an explanation of the delay, but the Lawyer did not receive this letter. On February 23, 2005, a follow-up letter was sent by Mr. Pabst and received by the Lawyer shortly thereafter.
35. The Lawyer investigated this issue and discovered that the \$316,474.37 used to pay for the lots had been improperly charged to a client (S) with no connection to KH or C Developments.
36. The Lawyer deposited \$329,248.63 of his personal funds into his trust account on February 28, 2005, and reported to the LSA on March 1, 2005: "I have discovered certain trust irregularities primarily involving our client KH. To date our investigation has not shown any trust defalcation". The Lawyer examined his

trust records and, by March 11, 2005, the Lawyer discovered that Ms. Fedio had improperly paid funds (in an amount different from that required to discharge the mortgage) from the F trust account to the law firm of Combe & Kent for the purchase of two lots by Construction.

37. On March 11, 2005, the Lawyer identified misappropriations of \$837,000.00 to LSA Investigators, and by March 24, 2005, the Lawyer paid further amounts from his personal funds into his trust account for total payments between February 28, 2005 and March 24, 2005, of \$1,014,996.96.
38. The Lawyer relieved Ms. Fedio of her duties on February 25, 2005; however, continued to pay her until March 31, 2005. Her employment was then terminated.
39. In September, 2007 the Lawyer, in the course of reviewing a client trust ledger where a balance of over \$5,000.00 had remained in trust since January of 2003, detected a number of missed postings on two other trust accounts. These were apparently part of a lapping scheme to cover the two misappropriations by Ms. Fedio in November, 2002.
40. The lawyer never notified law enforcement authorities of the trust shortages resulting from the misappropriations and did not pursue any civil action against Ms. Fedio. The Lawyer offered the explanation that Ms. Fedio is a single parent with dependents, and that the well-being of those dependents would be jeopardized if she was incarcerated. The Lawyer felt that Ms. Fedio had already been substantially penalized by the loss of her long-time employment, a job that apparently meant everything to her, and that she would have no means to pay any Judgment.

I. CITATIONS 1, 2, AND 3

A. FINDINGS OF FACT

41. The Lawyer's firm contracted-out its bookkeeping services to a business which served multiple law firms. The contractor provided a staff person on site at the firm with backup by a Supervisor. The bookkeeper was responsible for making trust account postings to the firm's accounting records (Esi Law), paying the payables, looking after the firm's internal accounting needs, and doing the monthly trust reconciliations.
42. A number of lawyers in the firm approved these monthly trust reconciliations, which were being prepared in the ordinary course of business and in a timely fashion.

43. The Lawyer's firm also contracted the services of an external accounting firm to prepare the firm's annual Financial Statements and to conduct the trust audits required by the LSA, including the preparation of the annual Form T for the firm.
44. The Lawyer's firm had previously been the subject of an LSA spot audit.
45. The firm did not have a voice mail service, and internal messages were communicated through Outlook. All members of the Staff had full access to the message inbox of the Lawyer.
46. The firm's Receptionist would receive all incoming mail and then place it in a folder to provide either to the individual lawyers or, alternatively, to provide to the lawyer's assistant.
47. The firm's trust account cheque books were centrally located and all members of the staff or the bookkeeper had authority to prepare cheques and then provide them to any of the lawyers who had authority to sign them.
48. The Investigation Report identifies a number of deficiencies in the Lawyer's trust accounting system and procedures:
 - There was no apparent review of the linkage between financial transactions and legal transactions;
 - Unusual transactions were not normally flagged by the accounting/bookkeeping staff;
 - There were no controls to prevent or detect on a timely basis trust accounts going into an overdraft position;
 - Outstanding trust balances were not reviewed on a timely basis;
 - The Lawyer's assistant was allowed to control client files and access the accounting system without significant supervision;
 - In the case of some of the Lawyer's real estate files, there is no evidence on file of how and when lots were paid for, how and when real estate commissions were paid, and how holdbacks were calculated and whether they were released.
49. While the Lawyer placed an extremely high level of trust in his assistant, Ms. Fedio, the Lawyer had access to all files and had regular daily meetings with Ms. Fedio about the active files.
50. Also relevant to the time frame in question here are the following facts:
 - The firm's bookkeeper prepared trust reconciliations for, among other months, August and September, 2004. The Lawyer did not sign the trust listings to

confirm that he had reviewed them until January 5, 2005, and then only after the bookkeeper advised that she had earlier prepared these trust reconciliations and they had not been approved and returned to her;

- The Lawyer followed up on long outstanding trust balances on an intermittent basis. For example, on one file, an amount in excess of \$5,000.00 remained in trust from January 31, 2003 until September, 2007 when the Lawyer made the appropriate correcting entries. This \$5,000.00 belonged to KH to whom no accounting for these funds had been given;
- The files maintained by the Lawyer, particularly those for which KH was the client, were at times incomplete in the sense that documents which should have been placed on the file were not with it, some of the documents showed calculation errors, and occasionally two or more different versions of a Statement of Adjustments or Statement of Trust Funds Received could be found on the same file. All Statements of Adjustments were approved by representatives of KH;
- The KH files did not always have filed on them final documents such as Certificates of Substantial Completion or clear title searches to support the release of final holdbacks. On occasion, funds were transferred from trust to general to pay legal fees without the immediate rendering and delivery of an account.

B. ARGUMENT

51. LSA Counsel argued that by virtue of the systemic deficiencies in the Lawyer's trust accounting system, and most significantly the lack of meaningful oversight by the Lawyer of the trust accounts, the Lawyer failed to prevent Ms. Fedio from misappropriating clients' funds. The lack of meaningful checks and balances, the systemic deficiencies which allowed Ms. Fedio to bypass the bookkeeper, and the disconnection between the trust accounting and the file work were all serious deficiencies for which the Lawyer was responsible. While lawyers can delegate certain tasks, the supervisory role must remain in tact and the level of supervision must be appropriate to all of the circumstances.
52. Counsel for the Lawyer argued that it was reasonable for the Lawyer to conclude that his accounting system, which had worked well over many years, was adequate, particularly where no difficulties had been identified by the checks and balances (bookkeeper and external accountant) that had been in place for many years. The problems which came to light were quite proximate to the time when the defalcations were actually discovered and were concealed by reasonable explanations from a long term staff member.

C. ANALYSIS

53. The purpose of LSA disciplinary proceedings is set out in Paragraph 52 of the Hearing Guide:

“The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.”

54. The *Legal Profession Act* sets out the general definition of conduct deserving of sanction (section 49(1)):

“49(1) For the purposes of this act, any conduct of a member, arising from incompetence or otherwise, that

(a) is incompatible with the best interests of the public or of the members of the Society, or

(b) tends to harm the standing of the legal profession generally,

is conduct deserving of sanction, whether or not that conduct relates to the member’s practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.”

55. Citation 1 claims in essence that the Lawyer enabled misappropriations through omissions, negligence, and failures, while Citation 2 claims in essence that the Lawyer is grossly negligent by the virtual abdication of all of his responsibilities for the trust accounting aspects of his practice.

56. Provisions in the *Code of Professional Conduct* of relevance are as follows:

“Chapter 2 - Statement of Principle

A lawyer has a duty to be competent and to render competent services.”

“Rule 4

A lawyer may assign to support personnel only those tasks that they are competent to perform and must ensure that they are properly trained and supervised.”

“G.1

The term “competence” eludes precise definition because it encompasses a broad range of characteristics. Some of these, discussed in more detail below, are the following:

(e) management and organization;”

“G.1 (e)

Management and organization. To be competent, a lawyer’s services must be economical, timely and efficient. A lawyer must therefore have adequate staff, equipment and facilities. As well, a law office should implement support systems that effectively deal with aspects of daily practice such as the following:

- Work management
- Accounting
- File management
- Monitoring of limitation dates
- Quality control of legal and office processes and documents
- Monitoring of conflicts of interest”

“C.4.1

General: The obligation to train employees extends to ethical guidance (see, for example, Rule #4 of Chapter 7, *Confidentiality*).

Supervision of every employee must be meaningful and effective. In particular, if a staff member is assisting a lawyer in providing services that are legal in nature rather than clerical, the standard of supervision required is extremely high. A system for periodic evaluation of employees facilitates the monitoring of competence on an ongoing basis.”

57. A central issue for the Hearing Committee is to determine if the Lawyer’s omissions, negligence, failure, and abdication of responsibilities rise to the level of conduct deserving of sanction. It must be kept in mind that the Citation alleges that the Lawyer’s conduct enabled misappropriations from his firm’s trust account and amounted to the virtual abdication of all responsibility for the trust accounting aspects of his practice.
58. The onus is on the LSA to prove the allegations on the balance of probabilities.
59. The Hearing Committee had concerns about some of the issues related to the Lawyer’s trust accounting system and the Lawyer’s role in relation to that system. However, the Lawyer maintained a direct role in the supervision of the files, as evidenced by his daily meetings with his assistant, and had direct supervision of some aspects of the trust accounting system by requiring the preparation of monthly trust reconciliations, and then approving or expecting other lawyers in the firm to approve them. The Lawyer’s system of monitoring his trust accounting included reliance on a bookkeeper obtained from a professional service, and a legal assistant he trusted and worked with for 16 years.

60. The Hearing Committee was referred to the provisions of the *Code of Professional Conduct* and the Rules of the Law Society of Alberta, however, no evidence was led about an accepted standard of supervision and training. The Lawyer testified that his system was essentially the one he had acquired from an experienced practitioner and was followed by other lawyers in his firm.
61. While the Lawyer's approach was simplistic, and his reliance on staff was perhaps naïve, the Committee found that the facts did not prove, on the balance of probabilities, that the Lawyer's conduct on these two Citations was incompatible with the best interests of the public or tended to harm the standing of the Legal Profession generally. Accordingly, Citations 1 and 2 were dismissed.
62. The Hearing Committee was of the view that the conduct at the root of the allegations in Citation 3 was, in substance, the same as the conduct at the root of Citations 1 and 2. Accordingly, and for the reasons stated above, the Hearing Committee dismissed Citation 3.

II. CITATION 4

A. FINDINGS OF FACT

63. The Lawyer acknowledged that the trust conditions imposed by C Developments were breached and that he was responsible for compliance with trust conditions that were imposed.
64. The Investigation Report states as follows:

“The member inappropriately delegated authority to his assistant to amend trust conditions on lot purchases from C Developments for KH home buyers. The *Code of Professional Conduct* prohibits certain tasks in the provision of legal services from being delegated to a non-lawyer, including exercising judgment with respect to accepting, imposing or amending trust conditions. The member's lack of supervision and lack of control in documenting lot purchases likely allowed situations like the C Developments complaint (lots not paid for by C&C as required) to occur and to remain uncorrected.”
65. The Lawyer stated as follows in a letter to Mr. Pabst of March 11, 2005:

“2. There was always a cooperative working relationship between KH and C Developments. When transfers were requested it was often understood the transfers may not necessarily be required to be used immediately. Discussions always occurred between Joan Fedio of these offices and H.L. of C

Developments with a view to managing the obtaining of transfers and the registering of those transfers in the name of the ultimate Purchaser of the new home which KH was building for them. For instance in respect of the specific Lots you refer to in your January 6, 2005 correspondence the trust letters received from C Developments all contemplated payment dates which were well in advance of the dates upon which the transfers ultimately came to be required. It is my understanding that Ms. Fedio and Ms. L. dealt with these matters on an informal basis without a formal amendment to C Development's trust letters. For that reason, and in reference for instance to the June 24, 2004 trust letter concerning [removed legal description] the projected deadline of July 12, 2004 was extended. Similar arrangements were in place with respect to all three Lots;".

B. ARGUMENT

66. Counsel for LSA argued that even though the Lawyer did not know of the breach of the trust conditions, his lack of knowledge resulted from his lack of supervision for which he was ultimately responsible.
67. Counsel for the Lawyer argued that the Lawyer's lack of knowledge concerning breach of the trust conditions arose from his reliance on a trusted, long-serving legal assistant which was consistent with Alberta practice and, accordingly, was not conduct deserving of sanction.

C. ANALYSIS

68. Provisions in the *Code of Professional Conduct* of relevance are as follows:

"Chapter 2, Rule 4

A lawyer may assign to support personnel only those tasks that they are competent to perform and must ensure that they are properly trained and supervised."

"C.4.1

General: The obligation to train employees extends to ethical guidance (see, for example, Rule #4 of Chapter 7, *Confidentiality*).

Supervision of every employee must be meaningful and effective. In particular, if a staff member is assisting a lawyer in providing services that are legal in nature rather than clerical, the standard of supervision required is extremely high. A system for periodic evaluation of employees facilitates the monitoring of competence on an ongoing basis.

Certain tasks in the provision of legal services may not be delegated to a non-lawyer. These include...

- Exercising judgment with respect to accepting, imposing or amending trust conditions;
- Exercising judgment with respect to giving or accepting undertakings.”

69. The Hearing Committee found that the Lawyer had improperly delegated tasks in the provision of legal services to Ms. Fedio, a non-lawyer, by allowing her to exercise judgement with respect to accepting, imposing, or amending trust conditions.
70. The trust conditions were breached and the fact that Ms. Fedio was a trusted, long-time legal assistant did not authorize the Lawyer to escape his responsibility for trust conditions. In the result, the Lawyer failed to honour trust conditions imposed upon him. The Hearing Committee found that the Citation was proven and the Lawyer’s conduct was deserving of sanction.

III. CITATION 5

A. FINDINGS OF FACT

71. The Lawyer provided a report to the LSA on March 1, 2005 which provided, in part, as follows:

“As a result of a complaint which was kindly communicated to me by Mr. Wasel and as a result of a review of the files referred to by Mr. Wasel in my discussions with him I have discovered certain trust irregularities primarily involving our client KH. To date our investigations have not shown any trust defalcation. We will be engaging the services of a forensic accountant to review our records to determine whether any defalcations had occurred. In the meantime I have identified one file involving a shortage in the order of \$316,000.00. I have personally contributed funds to cover that shortage in the meantime.

The irregularities which we have discovered occurred over a period of approximately one year but were wholly unknown to the writer. All of those irregularities arose from activities undertaken by the writer’s assistant of some 16 years and upon whom I placed a great deal of trust and faith in. I sincerely regret any inconvenience this may cause.”

72. The Lawyer provided a report to the LSA on October 3, 2007 which provided, in part, as follows:

“As a result of routine efforts to eliminate outstanding trust balances I discovered further discrepancies regarding the files of KH. I enclose for your consideration copies of the ledger cards for the files which were affected.

The net result of the adjustments contained herein is that the amount paid to the benefit of KH in excess of what ought to have been paid needs to be reduced by \$35,260.40.”

73. The Lawyer provided documents to the LSA including a listing of known trust shortages/misappropriations.
74. The Lawyer met with LSA Investigators on a preliminary basis on March 11, 2005, and for three interviews after Investigation Orders were made (July 5, 2007, October 5, 2007, and December 7, 2007). There was no evidence that the Lawyer failed to fully answer any question put to him by the Investigator.

B. ARGUMENT

75. Counsel for the LSA argued that the Lawyer’s responses to the LSA must be prompt, frank, and complete. While the Lawyer did not deliberately mislead the LSA, he failed to respond in a full and complete manner. His initial letter to the LSA tended to downplay what was going on and while he offered to have an independent review and verification conducted, he did not follow through on that offer. LSA Counsel advised that he was not pursuing the allegation in 5(b).
76. Counsel for the Lawyer argued that the Lawyer did not mislead the LSA, but rather conducted a full internal investigation, disclosed the results to the LSA, and thereby fulfilled his responsibilities to the LSA.

C. ANALYSIS

77. Provisions in the *Code of Professional Conduct* of relevance are as follows:

“Chapter 3 - Statement of Principle

A lawyer has a duty to uphold the standards and reputation of the profession and to assist in the advancement of its goals, organizations and institutions.”

“Rule 3

A lawyer must respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply.”

78. The Hearing Committee found that while it might have been in the Lawyer's personal interest to obtain an independent review and verification of his trust accounts following the discovery in February, 2005 of "trust irregularities", he did not do so. However, he provided the information known to and discovered by him in a prompt and complete manner. The Hearing Committee found that the facts did not demonstrate on the balance of probabilities that the Lawyer's conduct was of such a nature that it was conduct deserving of sanction. The Lawyer, in effect, self reported on March 1, 2005, provided the LSA with the results of his internal examination, and cooperated with the investigation process.
79. Accordingly, and for the reasons stated above, the Hearing Committee dismissed Citation 5.

IV. CITATION 6

A. FINDINGS OF FACT

80. Ms. Fedio allegedly represented to Q and RT that she could obtain funds for Construction from unnamed "investors" who wanted an 8% return on the amounts advanced, and funds for 112 from unnamed investors who wanted half of the profits on the property. The funds advanced to Construction and 112 or others on their behalf were actually misappropriations from the Lawyer's trust account.
81. Once the Lawyer discovered the improper payments made to Construction and 112, he also took steps to recover the money from them. The Lawyer entered into letter agreements with each of them dated March 9, 2005. The agreements provided for the transfer of land to the Lawyer "to be held as security for the repayment of the amounts that have been advanced to Construction/112 on account of the acquisition of the land and on account of construction." The letter agreements covered the repayment of the funds improperly paid to Construction and 112 as well as further funds to be advanced by the Lawyer required to complete the construction of houses on the lots.
82. Under the letter agreement with Construction, it was to repay all funds together with interest at 8%. Under the letter agreement with 112, it was to repay to the Lawyer all funds together with one half of the profit when the property was sold.
83. Ultimately, the Lawyer received full reimbursement of all personal funds he had paid to cover the trust shortages for funds paid to or on behalf of Construction and 112, plus interest in the sum of \$18,628.00 from Construction (calculated from the date the funds were improperly advanced to the date the Lawyer paid

his personal funds to his trust account to replace those misappropriated funds), plus profits from 112 estimated at between \$4,850.00 and \$11,800.00 (calculated from the date the funds were improperly advanced to the date the Lawyer paid his personal funds to his trust account to replace those misappropriated funds).

84. Between February 28 and March 24, 2005, the Lawyer paid \$1,014,996.96 from his personal funds into his trust account. The Lawyer obtained these funds from his personal and his Professional Corporation's investments, money market funds, and by borrowing funds from friends who were also clients.
85. No other member of the Lawyer's firm contributed to covering the trust shortages.
86. On discovering the improper payments to Q, the Lawyer demanded return of the funds. Q signed a Promissory Note for \$45,000.00 on February 23, 2007, including a Direction to Pay Funds from the proceeds of a sale file against the debt. The Lawyer still has not recovered any of the personal funds paid by him to cover the funds improperly paid to Q. Q was a co-owner of Construction with RT and is the sole owner of 112.
87. The Lawyer has never received any funds to repay the amounts improperly paid to Ms. Fedio.
88. The Lawyer has not recovered additional personal funds paid by him to discharge the ATB mortgages related to G and L, and those payments are the subject matter of litigation with KH.

B. ARGUMENT

89. Counsel for the LSA argued that when the Lawyer entered the deals to get his personal funds back from Construction and 122 he adopted and enhanced an undocumented and illegal deal. The Lawyer took no action to divest himself of the interest or profits he had obtained from Construction and 112 with respect to the period of time prior to his replacement of the misappropriated trust money. Section 49 of the *Legal Profession Act* applies when a lawyer benefits from client trust shortages in his own trust account.
90. Counsel for the Lawyer argued that because it was completely appropriate for the Lawyer to take steps to recover the money that he personally paid to cover the misappropriations, there was nothing untoward about him collecting the interest and profit which would have otherwise been earned and holding those funds pending determination of the litigation with KH.

C. ANALYSIS

91. The Hearing Committee considered this Citation from the perspective of Section 49(1)(b) of the *Legal Profession Act* to determine whether the conduct of the Lawyer “tends to harm the standing of the legal professional generally”. Determination of that question is, to some extent, informed by the entire factual matrix within which the Lawyer’s conduct is situated, and the Hearing Committee had in mind the totality of the evidence in this Hearing.
92. While it was admirable that the Lawyer covered all of the trust deficiencies out of his own personal resources, it is worth recalling that the Lawyer’s actions in that regard amount to a fulfillment of his contractual obligations to his clients and compliance with his ethical duties as a Lawyer.
93. No issue is taken with the Lawyer’s ability to appropriately recover the money which he has personally paid to cover the trust shortages. What is solidly at issue here is the Lawyer’s negotiation of and receipt of the interest and profits related to misappropriated money retroactively to the date of the original improper advances.
94. Here, the Lawyer chose to step into the shoes of a hypothetical investor, who loaned funds to third parties by misappropriating them from the lawyer’s trust account. By doing so, the Lawyer associated himself in appearance, if not in fact, with an improper transaction funded with stolen money. Especially when viewed within the context of all of the facts here, the impression the public might have is that the Lawyer did not consider the transgressions serious enough to distance himself from them, or that he was even prepared to personally profit from the scheme, or perhaps even that the Lawyer might have been more involved in the misappropriations than he was.
95. The Hearing Committee accepted the Lawyer’s explanation that he elected to participate in the loan arrangements to minimize the disruption to the third parties who received the funds, and as a means of recovering some of the funds he personally posted to cover the shortfall in the trust account. However, those ends did not justify the means employed. Lawyers have a duty to utilize the highest business standards of the community, and to conduct themselves in such a way that they maintain the public’s confidence in the integrity of the profession. By becoming a participant in the lending scheme, the Lawyer might reasonably have been viewed as condoning, and even furthering the scheme itself. As a consequence, he invited serious criticism of his reputation and associated himself with activities that tend to harm the standing of the Legal Professional generally.
96. The Hearing Committee therefore found that the Citation was proven and that the

Lawyer's conduct was deserving of sanction.

V. CITATION 7

A. FINDINGS OF FACT

97. During the period of the improper trust payments, it was very difficult for various parties to contact the Lawyer or get responses to their inquiries. A specific example is the letter from Mr. Pabst to the Lawyer of January 6, 2005, complaining about the breach of trust conditions.
98. The Lawyer's uncontested evidence was that Ms. Fedio intercepted his mail and telephone messages from the complaining individuals, apparently to conceal the many improper transactions in which she was engaged.

B. ARGUMENT

99. Counsel for the LSA argued that while the Lawyer may not have received communications, that was the result of his own lack of supervision, and did not provide an excuse for his failure to respond.
100. Counsel for the Lawyer argued that the Citation was the same conduct as that alleged in Citations 1 and 5, and that it should be dismissed for the same reasons.

C. ANALYSIS

101. The Hearing Committee found that the Lawyer did not respond to the various communications at issue because he did not receive them -- they were being intercepted by Ms. Fedio.
102. The Hearing Committee's view was that a reasonably diligent lawyer would not create office procedures contemplating the wrongful interception of communications by a trusted, long-term staff member. The administration of office communications, unlike trust conditions, is properly delegated and entrusted to professional office staff, and the level of staff supervision to be exercised by the lawyer is less onerous. Accordingly, the Lawyer's failure to respond to lawyers and others on a timely basis was found to not be conduct deserving of sanction, and Citation 7 was dismissed.

SANCTION

A. ARGUMENT

103. Counsel for the LSA argued that while the Lawyer had no discipline record, a reprimand and fine in the order of \$5,000.00 were necessary. The Lawyer's conduct in breaching trust conditions, particularly when that was the result of a lack of supervision by the Lawyer, was serious. While the Lawyer was fortunate in being able to recover most of the funds he personally paid to cover the misappropriations, the Lawyer's personal decisions on how he recovered those funds reflected badly on the reputation of the Legal Profession which has implications on self governance.
104. Counsel for the Lawyer argued that the Lawyer had expedited the Hearing process by agreeing to the Investigation Report being made as an Exhibit and by offering an Agreed Statement of Facts at the Hearing. Counsel for the Lawyer argued that a reprimand was sufficient and that a fine would not achieve the objectives of protection of the public and was not necessary in the public interest or to preserve the reputation of the Legal Profession. Counsel argued that the facts here were very novel and that the Lawyer's conduct sprang from a time of much turmoil.
105. After enquiries from the Hearing Committee, the Lawyer undertook to pay into Court in the litigation with KH, the sum of \$23,478.00, being \$18,628.00 interest in respect of the Construction transactions and \$4,850.00 profit in respect of the 112 transactions, on the basis that the Court in that litigation would adjudicate entitlement to those funds.

B. ANALYSIS

106. The Hearing Committee found that the Citations on which the Lawyer was found guilty were not mere technical breaches, but were substantive ethical deficiencies. Citation 4 brings into play questions relative to the public interest and protection of the public. The use of trust conditions is fundamental to the practise of law and compliance with trust conditions is considered sacrosanct. Citation 6 brings into play questions with respect to reputation of the Legal Profession generally which is inextricably linked with the Profession's right of self governance. Delegation by a lawyer of his responsibility for compliance with trust conditions or for their amendment to staff raises significant concerns.
107. The Hearing Committee took into account the general and specific factors articulated in paragraphs 60 and 61 of the Hearing Guide. Many of the factors set out in paragraph 61(h) mitigated in favour of the Lawyer. The Hearing

Committee was, however, particularly concerned about the nature of the conduct in the sense of the concerns which were raised about protection of the public arising from the Lawyer's conduct, concerns about maintaining public confidence in the Legal Profession, and concerns about the ability of the legal system to function properly. Weighing all of the factors, including the need for general deterrence of other lawyers and denunciation of this Lawyer's conduct, the Hearing Committee concluded that a reprimand and a fine of \$5,000.00 was appropriate.

108. With respect to the matter of costs, the Hearing Committee was of the view that costs are a discretion to be exercised by a Hearing Committee to be exercised in a principled way and based upon the facts relevant to the Hearing.
109. In this case, the Lawyer was found guilty of two of seven Citations, however, most of the allegations and evidence were significantly interrelated and relevant to the Citations on which the lawyer was found guilty. While it is true that the two most serious Citations were dismissed, the Hearing Committee had no difficulty in understanding why these Citations were directed and prosecuted based on the evidence of deficiencies in the Lawyer's accounting system and supervision of it.
110. In all of the circumstances, recognizing that several Citations were dismissed, the Lawyer was ordered to pay three quarters of the actual costs of the Hearing.

SANCTIONS AND ORDERS

111. In the circumstances, the Hearing Committee made the following Orders concerning Sanction:
 - A. An Order that the Lawyer be reprimanded.
 - B. An Order requiring the payment to the LSA of a fine in the sum of \$5,000.00 regarding the Lawyer's conduct in respect of Citations 4 and 6.
 - C. An Order requiring the payment to LSA by the Lawyer of three quarters of the actual costs of the Hearing.
 - D. An Order allowing the Lawyer time of 60 days from the date of notification of the actual costs of the Hearing by LSA to pay the fines and costs.

CONCLUDING MATTERS

112. The Exhibits and proceedings will be available for public inspection which includes copies of Exhibits for a reasonable copy fee. The Exhibits and proceedings shall be redacted to exclude the names of any clients and to protect Solicitor Client privilege.
113. No referral to the Attorney General is required.
114. No Notice to the Profession is ordered.
115. The Chair delivered a reprimand which expressed denunciation for the conduct of a senior and experienced member of the Bar whose practice with respect to trust conditions puts the public at risk, and whose conduct sullies his own reputation and reflects badly on the reputation of the Legal Profession.

Dated this 20th day of August, 2009

Rodney A. Jerke, Q.C., Bencher
Chair

Kevin S. Feth, Bencher

Wayne Jacques, Bencher